COURT OF APPEALS
DECISION
DATED AND FILED

December 30, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

No. 96-2141

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

JOSEPH S. MAKHLOUF

PLAINTIFF-APPELLANT,

V.

MICHAEL J. KERN,

DEFENDANT-RESPONDENT,

MICHAEL A. ORVILLE, BOZENA U. ORVILLE, GREGG A. ZETZMAN, D/B/A HEARTLAND BUILDING INSPECTION, AND ROBERT OSTEN, D/B/A C.P. OSTEN PLUMBING & HEATING CONTRACTORS (A DIVISION OF OSTEN PLUMBING & HEATING, INC.),

DEFENDANTS.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: ARLENE D. CONNORS, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

PER CURIAM. Joseph S. Makhlouf appeals from a trial court judgment granting Michael J. Kern's motion for summary judgment and dismissing with prejudice all of Makhlouf's claims against Kern. Makhlouf also appeals from the order denying his motion for reconsideration. The underlying lawsuit involved claims by Makhlouf, the buyer of an apartment building, against Michael A. Orville, the seller, and Kern, the seller's energy efficiency inspector, for breach of contract, intentional misrepresentation, strict responsibility for misrepresentation and negligent misrepresentation.[1] The trial court granted summary judgment apparently on the grounds that: (1) Kern owed no duty to Makhlouf because Kern had not contracted with Makhlouf; and (2) as a matter of law, Makhlouf had not relied to his detriment on any alleged misrepresentations made by Kern. On appeal, Makhlouf claims that the trial court's grant of summary judgment was inappropriate. We conclude that summary judgment was appropriate for the breach of contract claim because there was no contract between Kern and Makhlouf. We also conclude that summary judgment was appropriate on the misrepresentation claims because Makhlouf, as a matter of law, did not rely to his detriment on any alleged misrepresentations made by Kern. Thus, we affirm the trial court judgment and order.

[1] The complaint also alleged rescission as a fifth cause of action. Makhlouf fails to make any arguments in his brief related to this claim; therefore, we deem it abandoned. *See* ***State v. Pettit***, 171 Wis.2d 627, 647, 492 N.W.2d 633, 642 (Ct. App. 1992) (court of appeals may decline to review an issue inadequately briefed).

I. BACKGROUND.

This case arises from Joseph S. Makhlouf's purchase from Michael A. and Bozena U. Orville of a twelve-unit apartment building located at 8940 West Mill Road in Milwaukee, Wisconsin. Prior to accepting Makhlouf's offer to purchase the building, Michael Orville contracted with Michael J. Kern, a state certified rental unit energy efficiency inspector, to conduct a DILHR rental unit energy efficiency inspection of the apartment building, pursuant to § 101.122, STATS.[2] On February 4, 1993, Kern inspected the building and the building did not pass the inspection. Nevertheless, on April 21, 1994, Makhlouf offered to purchase the building, and the Orvilles accepted his offer on that date. The sale was conditioned upon Makhlouf, at his option, having a qualified independent inspector inspect the building and conclude that it had no defects. The sale was not, however, conditioned upon the Orvilles obtaining a proper certificate of compliance with DILHR's rental weatherization program.

On May 11, 1994, Kern, acting on the sellers' behalf, reinspected the building and the building again failed the inspection. Pursuant to the contract's conditions, Makhlouf contracted with Heartland Building Inspection, and, following the Orvilles' acceptance of Makhlouf's offer, Heartland inspected the building on May 12, 1994. Heartland's report indicates that on May 12, 1994, there were some problems with the building, including damaged windows, furnace problems, and damaged weather stripping on the doors. Also, on June 8, 1994, Kern, still acting on behalf of the sellers, performed a final inspection of the

[2] Section 101.122(4)(a), STATS., states that "no owner may transfer a rental unit unless, within the previous 5 years, an inspector has inspected the unit and has issued a certificate stating that the unit satisfies applicable [energy efficiency] standards."

building and signed a certificate of compliance with DILHR rental unit efficiency standards. Following that inspection, the sale of the building was finalized on June 21, 1994.

On August 21, 1994, Makhlouf contacted DILHR, and requested a re-inspection of the building. Ergun I. Somersan, DILHR's chief engineer at the time, inspected the property and found that seventy-five percent of the windows were in need of repair or replacement, that the caulking and weather stripping were in poor condition, and that the forced air heating plants were dirty and that there were no signs of recent service or tune ups. In November of 1994, based on his inspection, Somersan wrote a letter to Makhlouf indicating that he was revoking the certificate of compliance issued by Kern, and ordering Makhlouf to bring his building into compliance with DILHR standards within 90 days.

Makhlouf subsequently filed a lawsuit against the Orvilles, Heartland Building Inspection, and Kern.[3] Makhlouf's complaint alleged breach of contract, intentional misrepresentation, strict responsibility for misrepresentation and negligent misrepresentation claims against all of the defendants. Kern brought a motion for summary judgment which the trial court granted. Makhlouf also brought a motion for reconsideration which was denied. Makhlouf now appeals.

[3] Makhlouf's original complaint was later amended to include Robert Osten, another inspector, who apparently inspected the building's heating system. Osten's exact relationship to the underlying action, which is somewhat unclear, is irrelevant for the purposes of this appeal.

II. ANALYSIS.

Our review of a trial court's grant of summary judgment is *de novo*. ***Green Spring Farms v. Kersten***, 136 Wis.2d 304, 315-16, 401 N.W.2d 816, 820 (1987). We use the same summary judgment methodology as the trial court. ***Id***. That methodology has been described in many cases, *see, e.g.,* ***Grams v. Boss***, 97 Wis.2d 332, 338-39, 294 N.W.2d 473, 476-77 (1980), and need not be repeated here. Summary judgment must be granted if the evidentiary material demonstrates "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." RULE 802.08(2), STATS.

Makhlouf's complaint alleged claims against Kern of breach of contract, intentional misrepresentation, strict responsibility for misrepresentation, and negligent misrepresentation. We conclude that summary judgment as to Kern was appropriate for each claim.

A. Breach of contract claim.

Makhlouf's complaint alleged a breach of contract claim against all of the defendants. In order to prove a breach of contract, a plaintiff must first prove the existence of a contract between the plaintiff and the defendant. Makhlouf has not shown the existence of such a contract, and could not possibly do so, because there was no contract between Makhlouf and Kern. Although Makhlouf signed a contract with Orville for the sale of the apartment building, Kern, an inspector hired by Orville, was not a party to that contract. Therefore, as a matter of law, Kern is not liable for breach of contract, and summary judgment was appropriate as to this claim.

B. Misrepresentation claims.

In his complaint, Makhlouf also alleged claims of intentional misrepresentation, strict responsibility for misrepresentation and negligent misrepresentation. A claim for misrepresentation can be based on any combination of these three theories. ***Ollerman v. O'Rourke Co***., 94 Wis.2d 17, 24, 288 N.W.2d 95, 99 (1980). Three elements are common to each type of misrepresentation: (1) the misrepresentation must be one of fact and made by the defendant; (2) the representation must be false; and (3) the plaintiff must have believed the representation and relied upon it to his or her detriment. ***Id.*** at 25, 288 N.W.2d at 99. In the instant case, Makhlouf has failed to present any evidence to show that he relied to his detriment on an alleged misrepresentation made by Kern. Therefore, as a matter of law, all three of his misrepresentation claims must fail.

The alleged misrepresentation at issue was Kern's statement, found in the certificate of compliance which Kern signed following his inspection, that the apartment building met the minimum DILHR rental unit energy efficiency standards. Makhlouf asserts that he relied on this statement to his detriment, specifically by choosing to purchase the property following Kern's inspection. Makhlouf could not, however, have relied on Kern's statements when choosing to buy the property because Makhlouf actually purchased the property prior to Kern's final inspection, certifying that DILHR regulations had been met. Kern signed the certificate of compliance on June 8, 1994, following his final inspection. Orville, however, accepted Makhlouf's offer to purchase the property

nearly two months earlier, on April 21, 1994.[4] Additionally, although the contract states that the sale was contingent upon four conditions, none of these conditions included the seller's obtaining a proper certificate of compliance with DILHR's weatherization standards.[5] As Makhlouf states in his brief, when determining whether the plaintiff relied on a defendant's alleged misrepresentation: "The question is whether the representations actually misled the plaintiff and materially affected his conduct. In determining whether the plaintiff actually relied upon the representations, the test is whether he or she would have acted in the absence of the representations." *See* WIS JI—CIVIL 2403. In the instant case, Makhlouf alleges that in the absence of Kern's alleged misrepresentation, he would have acted differently, or changed his conduct, by choosing not to purchase the apartment building. However, according to the terms of the contract which Makhlouf signed two months before Kern's inspection, Makhlouf did not have the option to cancel the sale because of a failure to obtain a proper certificate of

[4] The copy of the real estate contract found in the record is not dated. Kern, however, asserts that it was signed by Orville on April 21, 1994. Makhlouf does not dispute this assertion, therefore, we deem it admitted. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis.2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979).

[5] The contracts states that "the buyer's obligation to conclude this transaction is conditioned upon the consummation of the following:"

> (1) Buyer being able to obtain within 45 days of acceptance of this offer a conventional fixed rate first mortgage loan commitment in the amount of not less than $328,000.00 for a term of not less than 30 years. Annual rate of interest not to exceed 7.9% or any other loan arrangement agreed to by the buyer.
>
> (2) At buyer's option, a qualified independent inspector conducting an inspection at the property and his certification of no defects.
>
> (3) Subject to buyer's attorneys approval within 3 days of acceptance.
>
> (4) Buyer retains the right to reinspect all units within 3 days prior to closing to ascertain the property is in the same condition as of the date of first inspection.

compliance.[6] He had already purchased the apartment building prior to the inspection, and therefore, as a matter of law, he did not rely to his detriment on Kern's alleged misrepresentation. Thus, summary judgment was appropriate as to Makhlouf's remaining misrepresentation claims.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

[6] We note that the contract does state that the seller "will be responsible for compliance with DILHR's rental weatherization program." Nonetheless, Makhlouf fails to point to this language, or any other language from the contract, as proof that he did have the right to cancel the sale in the event that the apartment failed to comply with DILHR's requirements. Therefore, we decline to make Makhlouf's arguments for him, and conclude that, as a matter of law, the contract gave Makhlouf no right to cancel the sale in the event of non-compliance. *See* ***Pettit***, 171 Wis.2d at 647, 492 N.W.2d at 642 (court of appeals may decline to review an issue inadequately briefed).